STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 17, 2015
v	No. 319690 Berrien Circuit Court
JOSHUA SHAWN COBB, Defendant-Appellant.	LC No. 2013-002528-FH

Before: M. J. KELLY, P.J., and MURPHY and HOEKSTRA, JJ.

PER CURIAM.

Defendant Joshua Shawn Cobb appeals by right his conviction of third-degree child abuse. MCL 750.136b(5). Because we conclude there were no errors warranting relief, we affirm.

Cobb's conviction arises from evidence that he injured the minor child after spanking the child for breaking a pipe. Three days after the spanking, the child's babysitter saw "black and blue" bruises on the child's buttocks. The babysitter took pictures and reported what she saw to Child Protective Services. Child Protective Services investigated and had the child examined by a doctor, who testified that the bruises were consistent with spanking.

On appeal, Cobb first argues that there was insufficient evidence to support his conviction. When reviewing a claim of insufficient evidence, this Court reviews "the record evidence de novo in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt." *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009).

A person is guilty of third-degree child abuse if the person knowingly or intentionally causes physical harm to a child. MCL 750.136b(5)(a); see also *People v Sherman-Huffman*, 466 Mich 39; 642 NW2d 339 (2002). The child must have been "less than 18 years of age" at the time of the incident, MCL 750.136b(1)(a), and the defendant must have had custody or care of the child, MCL 750.136b(1)(d). "Physical injury" means "any injury to a child's physical condition." MCL 750.136b(1)(e).

The prosecutor presented evidence that the child was two years of age at the time at issue and was under Cobb's care and custody. There was also evidence that Cobb struck the child with sufficient force to cause physical harm, which in turn permits an inference that he struck the

child with the requisite intent. *Sherman-Huffman*, 466 Mich at 41. A defendant's state of mind may be established by minimal circumstantial evidence and the reasonable inferences drawn therefrom. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). Cobb admitted that he grabbed the child by the arm and gave him three "swats" on the buttocks. A few days later the child had visible bruises on his buttocks. The doctor's testimony, viewed in a light most favorable to the prosecution, established that the bruises were a result of Cobb's spanking. The doctor also testified that it would take a significant amount of force to cause the bruising. See *Sherman-Huffman*, 466 Mich at 41 (stating that the evidence of the victim's extensive bruising was sufficient to establish that the victim sustained physical injury). Viewing the evidence in a light most favorable to the prosecution, a reasonable jury could find that Cobb knowingly or intentionally struck the minor child with sufficient force to cause the bruising and that the child was in his care or custody. Consequently, there was sufficient evidence to support the verdict. *Roper*, 286 Mich App at 83.

Cobb next argues the trial court abused its discretion when it refused to allow his lawyer to cross-examine the babysitter on her mental illness. This Court reviews a trial court's decision on the admission of evidence for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008).

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "The credibility of a witness is always an appropriate subject for the jury's consideration. Evidence of a witness' bias or interest in a case is highly relevant to credibility." *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). However, a trial court may prohibit a party from cross-examining a witness on collateral matters bearing only on general credibility or on irrelevant issues. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Cobb had the burden to show that the evidence was relevant and admissible. *People v Crawford*, 458 Mich 376, 386 n 6; 582 NW2d 785 (1998). Yet he did not assert with any specificity at trial, nor does he do so on appeal, how the babysitter's mental condition affected her testimony at trial or her perceptions of the events that led to the allegations of child abuse. Cobb also failed to show that during the time-frame at issue, the babysitter exhibited a disposition to lie or hallucinate, or that she suffered from a severe illness that dramatically impaired her ability to perceive and tell the truth. Further, there is no record evidence tending to show that the babysitter's mental health had a bearing on this case. On the record before this Court, the babysitter's mental illness did not have a tendency to make her testimony more or less credible, MRE 401, and her mental illness was collateral to the case at bar. *Canter*, 197 Mich App at 564. Accordingly, the trial court did not abuse its discretion when it refused to allow Cobb's lawyer an opportunity to cross examine the babysitter on her mental illness. *Unger*, 278 Mich App at 217.

Cobb next argues that the trial court erred when it allowed the prosecution to elicit testimony by two staff persons with Child Protective Services, Cindy Wallis and Andrea Pena, which impeached Cobb's father's testimony. At trial, Cobb's father testified that he talked to Cobb via the telephone to wish him a happy birthday. During this telephone conversation, Cobb told his father that he had spanked the child. At trial, Cobb's father denied that his son told him

that had "spanked the hell out of" the child. He further denied having told Wallis and Pena that his son had said the same thing. Wallis and Pena, by contrast, both testified that Cobb's father told them that Cobb said he spanked the "the hell out of [the child's] ass."

Cobb's trial lawyer specifically asked for and agreed to a limiting instruction regarding Wallis' testimony concerning this conversation. By agreeing to the trial court's handling of this issue, Cobb's lawyer waived any claim that the trial court erred by permitting the testimony subject only to a limiting instruction. See *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Although Cobb's lawyer later asked for Wallis' testimony to be stricken from the record on double hearsay grounds, after Wallis testified, the hearsay error had already been extinguished by the waiver. *Id.*

Cobb's lawyer did object to Pena's testimony under MRE 403. In evaluating the testimony under MRE 403, this Court must determine whether the probative value of the evidence was substantially outweighed by the danger of unfair prejudice. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995). Here, the evidence that Cobb's father lied about making a statement to Pena was relevant and tended to show that he was biased. *Coleman*, 210 Mich App at 8. Additionally, the probative value of the impeaching evidence was not substantially outweighed by the danger of unfair prejudice. *Mills*, 450 Mich at 66. "This Court has recognized the danger that not the sworn testimony given in court, but the unsworn, extrajudicial statements made by witnesses will be used to convict a respondent." *People v Jenkins*, 450 Mich 249, 261; 537 NW2d 828 (1995) (citation and quotation omitted). "The introduction of such testimony, even where limited to impeachment, necessarily increases the possibility that a defendant may be convicted on the basis of unsworn evidence, for despite proper instructions to the jury, it is often difficult for them to distinguish between impeachment and substantive evidence." *Id.* at 261-262 (citation and quotation omitted). Nevertheless, on close evidentiary questions, this Court will defer to the trial court's exercise of discretion. *People v Cameron*, 291 Mich App 599, 608; 806 NW2d 371 (2011). In this case, Wallis' testimony had already been admitted. Thus, Pena's testimony was cumulative. In addition, the evidence directly proved the fact for which it was offered—namely, that Cobb's father was less than credible. *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008). On this record, we cannot conclude that the trial court abused its discretion.

Cobb's father's statement to Pena was also not inadmissible hearsay. "Hearsay" is an out of court statement "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Here, the witnesses did not testify about Cobb's father's statement to prove that Cobb actually spanked the child or to prove that Cobb actually made the statement; rather, they testified to show that Cobb's father's statements concerning the admission were not credible. Moreover, the statement was properly admitted under MRE 613(b). Accordingly, the trial court did not plainly err as related to hearsay when it admitted Cobb's father's statement through Pena. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Cobb next argues that the trial court abused its discretion when it denied his motion for a mistrial after a police officer testified that Cobb had an outstanding warrant for driving on a suspended license. This Court reviews a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

A trial court should grant a mistrial when there is an irregularity that is prejudicial to the rights of the defendant and impairs the fairness of the trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A mistrial is appropriate only where the error complained of is so egregious that the prejudicial effect can be removed in no other way. *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). "As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990).

At trial, a police officer testified generally that he contacted Cobb on the telephone to further investigate the child abuse allegations made by the babysitter. During the officer's testimony, he informed the jury that Cobb had an outstanding warrant for driving on a suspended license. The prosecution did not ask the officer about the warrant and there is nothing in the record to indicate that the prosecutor knew the officer would refer to Cobb's warrant or that the prosecutor encouraged the disclosure.

We recognize that the officer's reference to the warrant was improper. Nevertheless, we conclude that Cobb was not prejudiced by the disclosure. The comment was isolated and the trial court struck the testimony and provided a prompt curative instruction alleviating any prejudicial effect. See *People v Waclawski*, 286 Mich App 634, 710; 780 NW2d 321 (2009). Further, the disclosure did not involve particularly egregious conduct and, for that reason, did not impair the fairness of the trial. *Alter*, 255 Mich App at 205. For these reasons, the trial court's decision to deny the motion was within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ William B. Murphy
/s/ Joel P. Hoekstra